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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2013

ALAN ANGRIST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS DELIVERED IN THE COURTS BELOW

No opinion was delivered in the District Court. The United States Court of

Appeals for the Second Circuit delivered an opinion (See App. p.1) which is printed at pp. 3037-3054 of the Second Circuit Slip Opinions for September Term, 1979 and which has not yet been reported in Federal Reporter, Second Series.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of conviction in the District Court was dated December 15, 1979 and was entered on December 24, 1979. The Circuit Court of Appeals affirmed the judgment by opinion dated May 22, 1980.

No rehearing or extension of time within which to petition for certiorari was requested.

28 U.S.C. §1254 is believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

THE QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Whether a defendant charged with (i) transporting a forged security across state lines and (ii) making written misrepresentations to a bank insured by the Federal Deposit Insurance Corporation was

denied adequate representation of counsel by the failure of counsel

(a) to move to dismiss the indictment, even though the indictment did not charge any facts which would show that the forged document, an equipment lease, was a "security" within the meaning of 18 U.S.C. §§2314 and 2311 or the manner in which the 32 pages of documents alleged to be misleading were, in fact, misleading;

(b) to seek a bill of particulars to establish what entries in the 32 pages of documents were claimed to be false;

(c) to submit requests to charge the jury which would have protected against the jury's use of evidence of uncharged other forgeries to establish the defendant's character and to guide the jury in determining whether the documents delivered to the bank were fraudulent and whether an equipment lease is a security within the meaning of 18 U.S.C. §§2314 and 2311; and

(d) to subpoena underlying books and records, or offer expert testimony, to establish that the documents submitted were not fraudulent;

and in view of defense counsel's admission

on the record, in a case which was a battle of expert witnesses in respect of the alleged forgeries, that he had never been involved in a case involving expert testimony.

2. Whether an equipment lease is a "security" within the meaning of 18 U.S.C. §§2314 and 2311.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Fifth Amendment To The United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless * * * nor be deprived of life, liberty, or property, without due process of law; * * * ."

Sixth Amendment To The United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

18 U.S.C. §371

"§371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the con-

spiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * * 62 Stat. 701.

18 U.S.C. §1014

"§1014. Loan and credit applications generally; renewals and discounts; crop insurance

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both." 84 Stat. 1815.

18 U.S.C. §2311

"§2311. Definitions

"As used in this chapter:

* * *

"'Securities' includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement,

collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing; * * * " 62 Stat. 805.

18 U.S.C. §2314

"§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

* * *

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.* * * " 62 Stat. 806.

STATEMENT OF THE CASE

Petitioner, Alan Angrist ("Angrist"), was charged in an indictment and convicted by a jury of the unlawful interstate transportation of a forged equipment lease, characterized in the indictment as a "security" within the meaning of 18 U.S.C. §§2314 and 2311 (Count 3), making written misrepresentations to a bank insured by the Federal Deposit Insurance Corporation in violation of 18 U.S.C. §1014 (Count 4) and conspiracy to commit these offenses (Count 1). Angrist was acquitted on a separate charge of unlawful interstate transportation of a forged equipment lease in violation of 18 U.S.C. §371 (Count 2). He was sentenced to concurrent terms of two years in prison in respect of Counts 1 and 3 to be followed by three years probation on Count 1. Federal jurisdiction arises out of charges of violation of federal criminal statutes.

In respect of the alleged violation of U.S.C. §2314, the indictment charged merely that Angrist and his co-defendant transported from New York to New Jersey

> "a falsely made and forged security, namely, an equipment lease bearing the name David Kelly,* * * "

without alleging any fact which would make the equipment lease a security within the meaning of 18 U.S.C. §§2314 and 2311.

In respect of the written bank misrepresentations, the indictment alleged that the misrepresentations were made by submitting to Maryland National Bank ("MNB") various documents specified in the indictment, which comprised 32 pages of information about Alphabetland, Inc. ("Alphabetland"), a corporation operated by Angrist and his co-defendant. The indictment did not specify what entries in these documents were alleged to be false and did not state the manner in which the documents were alleged to be false except to assert in conclusory language that they "falsely presented the financial condition of Alphabetland." (See the indictment, App. p. 49.) (The Court of Appeals found that "the manner in which these documents were misleading" was "stated", although it is respectfully submitted that the language of the indictment does not do so.)

Inexplicably, Angrist's trial counsel failed to move to dismiss the indictment or any part of it. He failed to seek a bill of particulars under Rule 7(f) of the

Federal Rules of Criminal Procedure.

Moreover, at the trial, in response to the trial judge's request, Angrist's counsel twice conceded that an equipment lease is a "security" within the meaning of 18 U.S.C. §§2314 and 2311.

At trial, handwriting experts testified for both sides on the issue of whether the signature on the subject equipment lease was a forgery. Angrist's counsel stated on the record that he had never previously "had" an expert witness.

At trial, testimony was introduced that someone, presumably Angrist and his co-defendant, had delivered to MNB the documents specified in Count 4 of the indictment, including an uncertified financial statement dated December 31, 1974, and thereby obtained a loan from MNB.

Substantial testimony concerned the alleged failure of these documents to disclose a loan from one Edward A. Chwatt to Alphabetland in an amount which the testimony indicated to have been outstanding in the amount of approximately $90,000 at the end of 1974. Angrist testified that this $90,000 loan was included in an entry of $129,877 which appeared under the current liabilities section of the Alphabet-

land balance sheet. The opposing testimony was simply to the effect that the specific loan was not disclosed and that the bank officer had been told that the entry included something else which he could not explain.

Angrist's counsel did not subpoena the underlying books and records of Alphabetland to establish that the $90,000 was included in that entry, nor did he offer any expert testimony to establish that the $90,000 loan could have been properly included in the aggregate figure.

There was testimony that Angrist and his co-defendant orally misrepresented to MNB that certain schools were under construction and land purchased, that certain notes receivable were not pledged and that a Uniform Commercial Code filing referred to a guaranty instead of a loan. Oral misrepresentations were not charged in the indictment and could not form the basis of a conviction.

Angrist's counsel submitted no requests to charge the jury. Since substantial evidence of uncharged other forgeries by Angrist and his co-defendant had been introduced at the trial, it was essential to a fair trial that the court charge the

jury under Rule 404(b) of the Federal Rules of Evidence that such evidence could not be used for the purpose of establishing Angrist's character in order to show that he acted in conformity therewith, but no such charge was requested or made.

It was also essential to a fair trial that the jury be given some guidance as to how to determine whether the documents delivered to MNB contained misrepresentations of fact or were otherwise misleading. No such instruction was requested and none was given.

It was essential to a fair trial that the court give the jury guidance as to how to determine whether an equipment lease is a security within the meaning of 18 U.S.C. §§2314 and 2311. Relying upon the concession of Angrist's counsel, the court simply instructed the jury that the equipment lease was a security.

Commencing in the early 1970's, Angrist and his co-defendant were engaged together in operating Alphabetland, which was engaged in the business of operating and franchising pre-school centers and summer day camps in various parts of the United States, largely in the New York area.

In the case of franchises, Alphabetland would sell a particular nursery school to a purchaser for cash and notes and would lease certain nursery school equipment and materials to the franchisee.

Alphabetland borrowed approximately $270,000 in the course of 1974 from a lender known as Middle States Leasing Corporation ("MSL") and in connection with those loans pledged certain notes and franchisees' equipment leases to MSL. Among the leases so assigned was the Kelly lease which, it was established at the trial, bore the forged signature of the franchisee.

Inferential conclusions support the claim that Angrist and his co-defendant were responsible for the transportation of this equipment lease from the New York Alphabetland office to the MSL office in New Jersey, although there was no direct evidence to rebut the possibility that the forged document had been transported, without the knowledge of Angrist, by the mortgage broker who had arranged the Alphabetland-MSL loan, and who later, after Alphabetland filed for bankruptcy reorganization, gained control of Alphabetland and forcibly excluded Angrist from Alphabetland.

The "equipment" leased under the equipment lease consisted of (a) fixtures such as a chalk board, a "slide-bilateral ladder", a basketball court, two merry-go-rounds, and two sand boxes, (b) various permanent items such as library books, dominoes, toys, chairs, tables and desks and (c) various consumables such as paint, crayons and construction paper.

The equipment lease ran for five years and required payments of $823 per month and required the lessee to maintain certain insurance.

The equipment lease required the lessor to purchase and arrange delivery of the equipment to the lessee and provided for the possibility of rejection of the equipment by the lessee.

The equipment lease specifically provided against the passage of title of the equipment to the lessee and provided that the lessor would retain documents of title. The equipment lease required the lessee to redeliver the equipment to the lessor at the expiration of the lease. The equipment lease provided for the peace and quiet possession by the lessee of the equipment during the term of the lease

and provided that the lessor could assign the lease without notice to the lessee.

Obviously, the equipment lease is a bilateral executory contract defining mutual future rights and obligations which may not even arise until a later time.

Indeed, in the present case, although the equipment lease was assigned by Alphabetland to MSL as security for the Alphabetland-MSL loan, MSL did not attempt to collect payments directly from the lessee but relied upon Alphabetland to continue to collect the payments itself until Alphabetland went into bankruptcy.

The witness representing MSL testified hypothetically that the equipment lease, if not forged, would have had value in that it could have been discounted to others, but there was no testimony that this had been done in the case of any other equipment lease, what credit rating of the lessee would be required or how a lease for consumables would be valued.

ARGUMENT

I

THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER ANGRIST WAS DENIED ADEQUATE REPRESENTATION OF COUNSEL.

This Court should review the question of whether Angrist was denied adequate representation of counsel because

(a) There is a conflict among the Circuit Courts of Appeal as to the proper standard to be applied for determining whether a criminal defendant received adquate representation of counsel; and

(b) The Circuit Court below decided an important question of federal law which has not been, but should be, settled by this Court.

The present case is an ideal one for this Court to establish the proper standard for determining adequacy of representation because the derelictions of defense counsel below can be evaluated by objective criteria and they did not reflect, as suggested by the Court below (App., p.17)"mistakes of judgment under pressure."

The decision not to move to dismiss the indictment and not to seek a bill of particulars was not made under pressure. The decision to concede that an equipment lease was a "security" should have been considered long before the trial. The decision not to request jury charges was not made under pressure. Counsel's lack

of experience in interrogating expert witnesses, in a case largely determined by experts, is an objective fact.

A. The Conflict Among The Circuits As To The Standard For Evaluating The Adequacy Of Representation Of Counsel.

Various Circuit Courts of Appeal have announced differing standards for evaluating the adequacy of a criminal defendant's representation by counsel. The extent of the conflict among the Circuits has been clearly described by Mr. Justice White in his dissent from this Court's denial of a petition for certiorari in Maryland v. Marzulo, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed. 2d 394 (1978). The most divergent views are reflected in the statement of the District of Columbia Court that

> "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973)

and the statement of the Second Circuit Court that a defendant is denied adequate representation only when the deficiency of the representation

> "was such as to make the trial a farce and a mockery of justice * * * ."

United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied 338 U.S. 950 (1950), quoted as the continuing rule in the Second Circuit in United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir. 1977).

The Seventh Circuit Court of Appeals has rejected the "farce and mockery" standard and has attempted to fashion a "minimum standard of professional representation", 545 F.2d at 22, involving a factual determination weighing "the seriousness of the charge, the experience of the attorney and the complexity of the evidence * * *." United States Ex Rel. Spencer v. Warden, 545 F.2d 21, 23 (7th Cir. 1976).

In Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979), the Ninth Circuit Court stated the rule that the defendant must show that ineffective assistance of counsel actually prejudiced him.

Obviously, a defendant is prejudiced if forced to trial without knowing what single entry in 32 pages of documents is claimed to be fraudulent or without knowing how an equipment lease is claimed to be a security. He is prejudiced if his

counsel fails to request jury charges to protect against improper jury use of evidence of other uncharged crimes or to guide the jury in determining what is a misrepresentation or what is a "security". He is prejudiced if his counsel lacks experience in examining and using expert witnesses in a case which is largely a battle of experts. He is prejudiced if, for that reason, his counsel neglects to offer expert testimony to rebut the claim of misrepresentation.

B. <u>There Were Meritorious Grounds To Move To Dismiss Indictment.</u>

For the reasons stated in Point II, infra, the third count of the indictment should have been dismissed because an equipment lease is not a "security" within the meaning of 18 U.S.C. §§2314 and 2311 and nothing is pleaded in the indictment to charge why the particular equipment lease is a "security". Certainly, counsel should not have conceded that an equipment lease is a security.

The fourth count of the indictment also should have been dismissed because it alleges merely that 32 pages of documents delivered to MNB "falsely presented the

financial condition of Alphabetland." This allegation does not sufficiently identify the parts of the documents which are claimed to contain misrepresentations or state the manner in which the financial condition of Alphabetland was allegedly misstated to charge a crime (i.e., "a * * * definite written statement of the essential facts constituting the offense charged" [FRCP Rule 7(c)(1)]).

This issue of dismissal is governed by the rule stated in United States v. Levinson, 405 F.2d 971, 977 (6th Cir. 1968):

> "In addition to stating the specific statutory violation alleged, the indictment must indicate the manner in which the alleged violation occurred and the essential factual allegations in support thereof." [Emphasis added.]

In other words, an indictment must be dismissed where "essential facts necessary to apprise a defendant of the crime charged" are not alleged in the indictment, United States v. Markee, 425 F.2d 1043, 1047 (9th Cir. 1970), as opposed to merely omitting the "theory" under which the government seeks to proceed.

Although the theory of the government's claim was clearly set forth in the fourth

count of the indictment, the manner of the misrepresentation was entirely concealed within the reference to a plethora of documents, largely discarded by the government at trial, with no explanation as to how any entry in any of the documents was alleged to be misleading.

Moreover, an indictment alleging misrepresentations by documents must state "what in the allegedly felonious paper is claimed to have been false" in order not to render "impossible any acceptable degree of confidence that the grand jury genuinely knew what it was doing," United States v. Fried, 450 F.Supp. 90, 93, 94 (S.D.N.Y. 1978). Otherwise, under broad, sweeping language, a grand jury could indict having one representation in mind, and the prosecutor could prosecute on another representation, thereby usurping the function of the grand jury. United States v. Thomas, 444 F.2d 919, 922-3 (D.C. Cir. 1971).

Prosecuting attorneys customarily meet this pleading requirement. It is clear from reading numerous decisions in which the language of a §1014 indictment is set forth, that the various United States Attorneys throughout the country have

consistently recognized the need in cases of document fraud to plead the definite manner in which the documents are alleged to have been fraudulent.

Thus, in United States v. O'Neill, 463 F.Supp. 1200, 1201-2, nn. 2 and 3 (E.D. Pa. 1979), the United States Attorney specifically pleaded (a) that the defendant had represented that an insurance policy would have a particular cash surrender value, and that the defendant knew it would not have that value because no premiums would be paid, and (b) that certain individuals had signed documents assigning the policies, and that defendant knew they had not.

Similarly, in United States v. Berlin, 472 F.2d 1002, 1005 (2d Cir. 1973), the indictment specifically alleged (a) a written representation of $2,200 having been deposited toward purchase of certain property when no deposit had been made, and (b) a false statement that a purchaser had paid $1,500 toward purchase of other property when that amount had not been paid.

In United States v. Sue, 586 F.2d 70, 72 (8th Cir. 1978), the indictment charged that the defendant misrepresented himself

as being the absolute owner of certain produce when it was, to his knowledge, encumbered with liens and security interests. In United States v. Gallagher, 576 F.2d 1028, 1055 (3rd Cir. 1978), the indictment charged that the defendants represented in a loan application that the borrower was to be a named individual when, in fact, she was not the borrower. In Robinson v. United States, 345 F.2d 1007, 1009 (10th Cir. 1965), the indictment charged that the defendant had listed liabilities in the sum of $30,000 when they exceeded $75,000. In Kovens v. United States, 338 F.2d 611, 613 (5th Cir. 1965), the indictment charged that the defendant had submitted a requisition stating he had spent a specified amount on construction when the sums had not been spent for that purpose. In United States v. Goberman, 458 F.2d 226, 227 (3rd Cir. 1972), the indictment charged that the defendant misrepresented his net worth as $2,017,400, although he knew it was only $268,393.49.

This practice of United States Attorneys throughout the United States of specifying in document fraud cases what was the specific fraud is tantamount to a recognition, similar to the respect accorded any other

government agency's established practice, that an indictment which fails to specify the parts of any document which are fraudulent and the manner in which such parts are fraudulent is defective and fails to charge a crime.

Elemental considerations of fairness also dictate that a defendant, as here, charged with fraud occurring in unspecified parts of 32 pages of financial and contractual information, be advised in the indictment as to what few entries contained in that voluminous documentation are claimed by the prosecutor to be misleading and the manner in which they are claimed to be misleading.

The protection of dismissal has been mandated in the case of similar charges against civil defendants, Shemtob v. Shearson, Hammill & Co., Inc., 448 F.2d 442 (2d Cir. 1971); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964), and no less protection should be afforded criminal defendants.

In Shemtob, supra, the Court stated the civil rule which should have governed the question of dismissal in the proceeding below as follows:

> "(M)ere conclusory allegations to the effect that defendant's conduct was fraudulent * * * are insufficient." 448 F.2d at 444.

In O'Neill, supra, that Court stated that rule as follows:

> "* * *[T]here must be allegation of facts amounting to deception in one form or another; conclusory allegations of deception or fraud will not suffice." 339 F.2d at 768.

The Court below found that counsel had waived the right to dismissal, and, it is respectfully submitted, such waiver is prima facie evidence that representation was not adequate.

II

THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER AN EQUIPMENT LEASE IS A "SECURITY" WITHIN THE MEANING OF 18 U.S.C. §§2314 AND 2311.

This Court should review the question of whether an equipment lease is a "security" within the meaning of 18 U.S.C. §§2314 and 2311 because

(a) There is a conflict among the Circuit Courts of Appeals as to whether these statutory provisions should be interpreted expansively or restrictively; and

(b) In this proceeding, the Second Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

A. The Conflict Among The Circuit Courts

In United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978), the Eighth Circuit Court of Appeals held that

> "* * * it is apparent that the definition of securities [in 18 U.S.C. §2311] is intended to be expansive." 562 F.2d at 1131.

In United States v. Canton, 470 F.2d 861 (2d Cir. 1972), United States v. Jones, 450 F.2d 523 (5th Cir. 1971) and United States v. Dunlap, 573 F.2d 1092 (9th Cir. 1978), the Second, Fifth and Ninth Circuit Courts of Appeals rejected an expansive interpretation of 18 U.S.C. §2311.

In the present proceeding, however, the Second Circuit has adopted an expansive definition of "security" to include a new category of instrument -- an equipment lease. An expansive definition is not consistent with the rule that any doubt that an instrument is included in the definition must be resolved in favor

of the defendant. Prussian v. United States, 282 U.S. 675, 677 (1931); McBoyle v. United States, 283 U.S. 25 (1931). The dispute among the circuits should, therefore, be resolved in Angrist's favor.

B. The Important Question Of Whether An Equipment Lease Is A "Security" Should Be Decided By This Court.

As indicated in the opinion of the Court of Appeals in this proceeding, equipment leasing has become an important and significant device for enabling the use of goods (App., p.12). Accordingly, the decision below may be expected to have wide impact, although Congress has not seen fit specifically to include equipment leases in the definition of "securities" contained in 18 U.S.C. §2311.

In holding that the subject equipment lease was a "security", the Court below relied on its conclusions, which petitioner disputes, that the equipment lease transferred an "interest" in the leased equipment, that it had "intrinsic value" and that it was not a "bailment for hire" but "intended to be used as security" (App., p.13), in essence "a conditional sale" (App.,p.14).

The subject lease, however, was not a conditional sale as the lessee had no right to purchase at the end of the term of the lease. Hence, no interest was transferred, but merely a license to possess created. Everything has some "intrinsic value",

> "[but] it does not follow that anything having value is a security * * *". United States v. Dunlap, 573 F.2d 1092, 1094 (9th Cir. 1978).

The decision below, broadly impacting as it does on a major industry, should be critically reviewed because it is doubtful, as explained hereinafter, that Congress intended to establish federal jurisdiction in respect of non-negotiable documents which do not evidence title and which are already substantially regulated by comprehensive state laws such as the Uniform Commercial Code and state laws respecting forged documents.

The term "security" is strictly defined in §2311, the following inclusions in the definition being the only ones which could possibly refer, even remotely, to an equipment lease.

> "Evidence of indebtedness;"
>
> "Certificate of interest in property, tangible or intangible;" and
>
> "Instrument or document or writing

evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title or interest in or to goods, wares, and merchandise; * * *."

"Evidence of Indebtedness": Traditionally, this term refers to a fixed and definite indebtedness, such as a money order, Nelson v. United States, 406 F.2d 1136 (10th Cir. 1969), and courts have refused to expand it to include credit card sales slips within this term. Beam v. United States, 364 F.2d 756 (6th Cir. 1966); Merrill v. United States, 338 F.2d 763 (5th Cir. 1964), cert. denied, 386 U.S. 994 (1967); Barack v. United States, 317 F.2d 619 (9th Cir. 1963).

A lease is a bilateral executory contract defining mutual future rights and obligations, some of which may not even arise until later, as a result of the lessee's use and enjoyment of the property, and, therefore, is not an evidence of indebtedness. It is not an obligation "to pay in the future for consideration presently received" [emphasis added], United States v. Austin, 462 F.2d 724, 736 (10th Cir. 1972), because the consideration (the enjoyment of the property) is to be received in the future. Indeed, the

subject equipment lease even governed Alphabetland's future obligation to purchase the equipment prior to its delivery to the lessee and the commencement of the lessee's obligations under the lease.

"Certificate of Interest in Property, Tangible or Intangible": As stated by the Circuit Court of Appeals for the Second Circuit,

> "[a] 'certificate of interest' in property [within the meaning of §2311] is a specific type of instrument issued to participants in joint ventures as evidence of the extent of their participation." United States v. Canton, 470 F.2d 861, 862 (2d Cir. 1972).

The subject equipment lease clearly does not fit within that definition, as no joint venture is established.

"Instrument or Document or Writing Evidencing Ownership of Goods, Wares, and Merchandise, or Transferring or Assigning any Right, Title or Interest in or to Goods, Wares, and Merchandise": This phrase immediately conjures up the image of a commodities futures contract which is traded like a stock, bond or other paper commonly referred to as a "security" or a warehouse receipt. It does not

suggest an equipment lease. By its terms, the present equipment lease was not an evidence of title to the equipment leased.

Generally, an equipment lease does not evidence ownership of personal property. An equipment lease is less an evidence of title than a bill of sale; yet "bill of sale" was deleted from §2311 before its enactment because

> "a bill of sale has no intrinsic value as a primary obligation to pay money or turn over property, and it would therefore have been inconsistent and inapposite to include it as a security." Canton, supra, 470 F.2d at 864.

An equipment lease does not, as a commodities futures contract would, transfer or assign any "right, title or interest in or to" personal property. It defines the obligations of the possessor of another's property without making any such assignment or transfer. Indeed, the subject equipment lease creates mutual obligations, requiring Alphabetland to purchase and deliver the leased equipment before any obligation of the lessee to pay arises.

Significantly, extensive research has disclosed no reported decision, other than the present one, in which an equipment lease was held, or even claimed by

a prosecutor, to be a "security" within the meaning of §2311.

The court held in United States v. Canton, supra, that "securities" within the meaning of §2311

> "are * * * instruments which have intrinsic value and are recognized and used as such in the regular channels of commerce." 470 F.2d at 864.

The concept refers "to instruments in themselves valuable to a thief", Merrill v. United States, 338 F.2d 763, 769 (5th Cir. 1964); yet an equipment lease would have no value to a thief.

The concept of the definition of "securities" in §2311 is akin to that of negotiability, and the language of the phrase of the definition here under discussion, "transferring or assigning any right, title, or interest," is clearly intended to refer to a non-negotiable instrument which has been made apparently negotiable though a transfer document. The inclusion of the "transferring or assigning" phrase with the "instrument or document" phrase within the semicolons which separate the various concepts of the definition establishes that the definition is one emphasizing negotiability or easy

transfer (see, Beam, supra, 364 F.2d at 759), which would not ordinarily include an equipment lease.

Moreover, as the court observed in Canton, supra, 470 F.2d at 864, the limitations on the definition of "security" are made clear by reference to the legislative history of amendments to §2311 and §2314, which eliminated the concept of placing a minimum dollar value on securities which are the subject of §2314 and added to §2311 a definition of the value of securities as "the face, par, or market value, whichever is the greatest," a concept which applies to what is ordinarily referred to as "securities" but does not apply to an equipment lease.

A key fact which segregates the subject equipment lease from the definition of "securities" contained in §2311 is the fact that MSL did not collect payments directly from the lessee but relied on Alphabetland to collect the payments itself until Alphabetland went into bankruptcy.

The final phrase of §2311 also buttresses the court's opinion in Canton, supra. The language

> "or any certificate of interest or participation in, temporary or interim

> certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited or spurious representation of any of the foregoing;"

clearly is not applicable to an equipment lease but is applicable to what is ordinarily referred to as a security which is freely transferable.

In United States v. Jones, 450 F.2d 523 (5th Cir. 1971), the court held that an airline ticket was not a "security" within the meaning of §2311. An airline ticket is similar to an equipment lease in that it entitles a person to use of certain space and services for the limited time prescribed, although it, of course, does not define the reciprocal obligations of the lessee because they were fixed before the ticket was issued. In that respect, an airline ticket is more analogous to a security, which ordinarily does not define the holder's obligations (because that part of the transaction is already completed), than an equipment lease, which does define the reciprocal mutual continuing obligation. Unfortunately, Angrist's counsel repeatedly conceded that equipment leases were included within the meaning of "securities" as used in those sections. This concession,

however, should not deprive petitioner of a hearing because a prosecutor, judge and defense counsel acting in concert may not create a crime where none exists; only Congress has that power, and only prospectively.

Accordingly, it is desirable that this Court review the decision below to ensure that federal jurisdiction is not created by that decision over matters which Congress intended that the states continue to regulate.

CONCLUSION

For the foregoing reasons, petitioner, Alan Angrist, respectfully prays that a writ of certioriari issue to review the judgement herein and opinion of the United States Court of Appeals for the Second Circuit, entered in this action on May 22, 1980.

Respectfully submitted,

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APPENDIX A

CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 993, 1009—September Term, 1979

(Argued April 15, 1980 Decided May 22, 1980)

Docket Nos. 80-1001, 1002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

HAROLD WEXLER,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALAN ANGRIST,

Defendant-Appellant.

Before:

LUMBARD, MULLIGAN, *Circuit Judges,*
and SPEARS,* *District Judge.*

* Honorable Adrian A. Spears, District Judge for the Western District of Texas, sitting by designation.

Appeals of judgments of conviction entered after jury trial in the United States District Court for the Eastern District of New York, George C. Pratt, *Judge*.

Affirmed.

JOEL J. SPECTOR, New York City (Demov, Morris, Levin & Shein, New York City, Arthur Birnbaum, New York City, of counsel), *for appellant* Wexler.

JOHN M. BURNS, III, New York City, *for appellant* Angrist.

ARLENE R. LINDSAY, Asst. U.S. Atty., New York City, (Edward R. Korman, U.S. Atty., E.D.N.Y., Mary McGowan Davis, Cheryl M. Schwartz, Asst. U.S. Attys., New York City, of counsel), *for appellee*.

SPEARS, *District Judge*:

Defendants Alan Angrist and Harold Wexler appeal from judgments of conviction after a jury trial of unlawful interstate transportation of forged securities (Count 3), making misrepresentations to a bank insured by the Federal Deposit Insurance Corporation (Count 4), and conspiracy to commit those offenses (Count 1). The defendants were acquitted on a separate unlawful transportation count (Count 2), and each was sentenced on Counts 1 and 3 to concurrent terms of two years in prison to be followed by three years probation on Count 4.

On appeal the defendants raise the following arguments: (1) that an equipment lease is not a "security" within the meaning of 18 U.S.C. § 2314, and that there

was insufficient evidence to establish that the defendants transported a forged equipment lease in interstate commerce (Count 3); (2) that the district court erred in permitting government counsel to introduce evidence of uncharged similar acts; (3) that the counts charging violations of 18 U.S.C. § 1014 (Count 4) and 18 U.S.C. § 371 (Count 1) are legally insufficient and should be dismissed; (4) that the evidence was insufficient to convict defendants of either the conspiracy count (Count 1) or the misrepresentation to a bank count (Count 3); (5) that Angrist's conviction should be reversed because he did not receive adequate representation during trial; and (6) that the district court erred in failing to charge the jury with respect to the use of inferences, the limited use of uncharged similar acts evidence, and the definition of a security within the meaning of 18 U.S.C. § 2314. Finding these arguments to be without merit, we affirm.

In 1970, Wexler and Angrist formed Alphabetland, Inc., a corporation organized to operate pre-school nurseries and summer day camps, primarily in the New York area. Angrist held the position of president and Wexler acted as executive vice-president and secretary of the corporation. When fund raising efforts failed in 1972, the defendants began to offer Alphabetland franchises, which involved the selling of an existing school or the starting-up of a new school in return for cash and a series of promissory notes. Where a new school was involved, Alphabetland would offer a nursery school equipment package and the franchisee often financed this package by entering into an "equipment lease" with Alphabetland. Under the equipment lease, title to the equipment was retained by Alphabetland and the franchisee was obligated to make lease payments over a 60 month period. Tuition payments were sent directly to Alphabetland, which de-

ducted any royalty, lease and note payments due and then forwarded the balance to the particular franchisee.

In 1974, Alphabetland was still experiencing financial difficulty, and in an effort to increase its operating capital Michael Paschel, a certified public accountant, was employed to assist in seeking financing. Alfred Grunow, an equipment leasing broker, also became associated with Alphabetland. Paschel and Grunow were instrumental in Alphabetland's efforts to obtain financing, but the evidence established that the loans were negotiated and finalized by the defendants. Between 1974 and 1975, Alphabetland obtained four loans from three separate companies.

These loans, and documents submitted in connection with the loan applications, formed the basis for the indictments returned in this case.

Middle States Leasing Loan

In February, 1974, Grunow arranged for Alphabetland to discount franchisees' notes to Middle States Leasing Corporation (MSL). Arrangements were also made for MSL to lend money to Alphabetland against the equipment leases of its franchisees. A vice-president of MSL testified that MSL loaned $90,000 to Alphabetland against the discounted notes, and approximately $270,000 in connection with both the notes and the leases. The same officer also testified that he had several conversations with both defendants, and that Angrist agreed to submit copies of four promissory notes which were to form the major portion of the collateral.

The copies, which were mailed to MSL, allegedly represented the promissory notes of four Alphabetland franchisees, executed in connection with the purchase of four

schools. Both defendants, who were residents of Long Island, New York, attended the loan closing in Passaic, New Jersey, at which time the defendants submitted the original four promissory notes. The evidence at trial established that the signatures on two of these notes had been forged. One of the notes had been signed by Frances Welner, a secretary at Alphabetland. After having been granted immunity, Mrs. Welner testified that one of the defendants (she thought Angrist) had asked her to sign the name of the franchisee on the note. Arthur Kirsch, another Alphabetland employee, who also testified under a grant of immunity, stated that he saw the secretary sign the note and that both defendants were present when it was signed.

In connection with the equipment leases, MSL agreed to discount five leases, with defendants receiving $30,000 per lease.[1] In return, MSL received an assignment of the franchisees' equipment leases, which gave MSL the right to collect over $40,000 in lease and interest payments from each franchisee. Each lease to be discounted was accompanied by a series of documents, and when MSL decided that it would discount a particular lease, both defendants would travel to the MSL office and produce the original supporting documents. It was subsequently determined that each of the equipment leases, as well as the supporting documents, were forgeries. All of the persons whose purported signatures were on the leases testified at trial, stating that they did not sign the equipment leases or the other documents submitted to MSL. MSL's vice-president testified that if the leases had been genu-

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1 Although under the typical equipment lease a franchisee paid approximately $30,000.00 for the package, excluding interest, it was established at trial that Alphabetland paid approximately half that much for each equipment package.

inc, they would have had commercial value, in that they represented the right to receive payments for the equipment. In addition, he testified that the leases were marketable, in that they could be discounted to yet another financial institution. Although the point is disputed, it appears from the evidence that the forged leases and supporting documents were delivered to MSL by both defendants. The government's handwriting expert testified that the signature on one set of documents had been forged by Angrist.

London Company Loan

In May, 1974, defendant obtained a $100,000 loan from the London Company, headed by Edward Chwatt. This loan was secured by a general pledge of all of Alphabetland's present and future assets, and seven promissory notes which turned out to be forged.[2]

Maryland National Bank Loan

After the lease discounting arrangement with MSL was concluded, Grunow introduced Wexler and Angrist to Richard Nee of the Maryland National Bank (MNB). Nee testified that although most of his contacts were with Angrist, on occasion he spoke with Grunow concerning the loan application. He testified that most of the data he received was sent by Angrist, and that the defendants failed to advise him of the existence of the outstanding obligation to the London Company. The documentation

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2 Defendants were not charged with unlawful transportation of these documents. This loan was relevant in that the government alleged that defendants intentionally failed to advise a federally insured national bank of its existence in a subsequent loan application.

submitted to MNB consisted of financial statements, a list of opening dates for recently constructed schools, a list of schools then under construction, a notes receivable list, a mortgages and notes payable list, and a term guaranty agreement.

Wexler and Angrist represented to MNB that with respect to the list of schools under construction, the land for each had been purchased, and that in most cases construction was actually under way. An Alphabetland employee testified that none of the schools on the two lists were actually under construction, although some of them were eventually opened. The list of notes receivable was also fraudulently prepared, in that MNB was advised that several of them were not already pledged as collateral, when in fact they were. Prior to approving the loan, MNB conducted a Uniform Commercial Code filing search, and it was discovered that the London Company had filed a lien against all present and future assets of Alphabetland. When confronted with this discovery, defendants explained that the London Company was acting merely as a guarantor for certain loans. In support of this explanation the defendants provided MNB with a copy of a "term guaranty agreement," which was purportedly signed by Mr. Chwatt, the holder of the London Company Loan, and which confirmed the false terms described by the defendants. The loan application was approved, and both defendants attended the loan closing. Mr. Chwatt testified that although the signature appeared to be his, he never signed such a document.

In spite of these various maneuvers (or perhaps resulting from them) Alphabetland's financial condition deteriorated to the point where in 1976 a petition in bankruptcy was filed on its behalf.

The Equipment Lease—Security Issue

Despite a concession at trial[3] that this was not an issue, both defendants strenuously argue that an equipment lease is not a "security" within the meaning of 18 U.S.C. § 2311. The National Stolen Property Act, 18 U.S.C. § 2314, proscribes the transportation in interstate or foreign commerce of stolen goods, wares, and merchandise with a value of $5,000 or more, stolen securities, or falsely made, forged, altered, or counterfeited securities. 18 U.S.C. § 2311 defines the term "securities" to include:

> . . . any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing; . . .

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3 The record reflects and the briefs confirm the fact that defendants' counsel repeatedly conceded that equipment leases were included within the meaning of "securities" as used in Title 18 U.S.C. §§ 2311 and 2314.

Counsel for the government insists that under *United States v. Knuckles*, 581 F.2d 305 (2d Cir.), *cert. denied* 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978), defendants are precluded from abruptly shifting their position to claim that an equipment lease is not a security. In *Knuckles*, we held that "[c]ounsel may not adopt one view of the proof in the trial court, thereby limiting the legal issues, and then adopt a different view of the evidence in order to raise other issues on appeal." 581 F.2d at 310. This was an amplification of our holding in *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959, 97 S.Ct. 2686, 53 L.Ed.2d 277 (1977) that:

> Rule 12(f), F.R.Crim.Pro. makes clear that '[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.' The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal. (citations omitted)

The defendants argue that the concession by trial counsel has no effect on the present appeal because under Rule 12(b)(2), Fed.R.Crim.P., an objection that an indictment fails to charge an offense may be raised for the first time on appeal, and because a "prosecutor, judge and defense counsel acting in concert may not create a crime where none exists." Whatever force this argument may have in other contexts, it is evident that it is not helpful to the defendants here. A motion to dismiss for failure to charge an offense, although cognizable for the first time on ap-

peal, does not lie where, as in this case, the indictment tracks the language of the statute and sufficiently sets forth the elements of the crime charged. As government counsel correctly points out, the issue is not whether count three on its face fails to charge an offense, since it clearly does, but whether the government can *prove* that a violation thereof occurred by relying on evidence concerning the equipment leases. One of the obvious elements of the offense charged under 18 U.S.C. § 2314 is interstate transportation of "falsely made, forged, altered, or counterfeited securities." Count three charged that defendants, "with unlawful and fraudulent intent, did transport in interstate commerce from West Hempstead, New York to Passaic, New Jersey, a falsely made and forged security, namely, an equipment lease bearing the name David Kelly, knowing said lease to be falsely made and forged." This count specifically and adequately described all of the essential elements of the offense it was alleged that the defendants committed. Thus we are not confronted with a situation where "a prosecutor, judge and defense counsel acting in concert" created a crime where none existed; a person who transports a forged security in interstate commerce with unlawful and fraudulent intent, and knowing the same to have been forged, has committed a crime under 18 U.S.C. § 2314. The concession simply made it unnecessary for the government to prove that the equipment lease was a security. Since it is our view that the equipment lease *was* a security within the meaning of § 2311, the defendants were in no way prejudiced by the concession, whether the issue was waived or not.

An "equipment lease" is not specifically included in the definition of "securities" in 18 U.S.C. § 2311, so we must determine whether such a lease is a writing which constitutes "evidence of indebtedness," or which evidences

"ownership of goods, wares, and merchandise, or [the] transferring or assigning [of] any right, title or interest in or to goods, wares and merchandise." We have not been directed to any reported decision which addresses this specific issue, but in the case of *United States v. Canton*, 470 F.2d 861 (2d Cir. 1972), this Court, in holding that a motor vehicle registration was neither a "certificate of interest in property" nor a "document or writing evidencing ownership of goods, wares and merchandise," and, therefore, not a security within the meaning of § 2311, nevertheless, did furnish some guidance by noting that securities are "instruments which have *intrinsic value* and *are recognized and used as such in the regular channels of commerce*." 470 F.2d at 864.[4] (Emphasis added).

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[4] In *United States v. Elliot*, 571 F.2d 880 (5th Cir.), *cert. denied, sub nom., Haukins v. United States*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), an automobile title certificate issued under Georgia law was distinguished from the New York automobile registration certificate with which this Court dealt in *Canton*. A certificate of title in Georgia was just that, while a registration certificate in New York was only for the purpose of showing that "the motor vehicle may rightfully be operated on public highways" and "was never intended . . . as a certificate of title." Thus, a certificate of title was held in *Elliot* to be a security, whereas, in *Canton* a registration certificate did not qualify under the security definition. In this connection, it is interesting to note that the Court gave an expansive reading to § 2311 in *United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 505 (1978), and found that a quitclaim deed was a security. However, in *United States v. Dunlap*, 573 F.2d 1092 (9th Cir. 1978), the Court refused to follow the expansive reading concept and held that a department store script was not covered by the definition in § 2311. On the other hand, in *United States v. Austin*, 462 F. 2d 724 (10th Cir. 1972), *cert. denied*, 409 U.S. 1048, 93 S.Ct. 518, 34 L.Ed.2d 1048 (1972), the Court was of the opinion that a loan commitment letter, which was sold for a substantial consideration, and which "appeared to be an enforceable obligation" that contemplated a flow of funds, was a security within the statutory definition. Credit sales invoices were held not to be securities in *Merrill v. Unites States*, 338 F.2d 763 (5th Cir. 1964), the Court stating that "Congress employed the term 'securities' in the usual commercial sense, to refer to instruments in themselves valuable to a thief." 338 F.2d at 769. That same Court later

In 1969, a New York Court described equipment leasing as being:

> a recent device whereby users of goods are enabled to have sole and exclusive use thereof for such periods of time as are economically beneficial to them at advantageous costs. It has become a widely used substitute for purchase, with the lessor, in economic reality, taking the place of a financing agency and the lessee paying the equivalent of the full purchase price, plus interest, within the minimum lease period. The lessee, in effect, is the true purchaser. Under present tax laws . . . it is foreseeable that this method of transferring the right to use goods will encompass a sizeable portion of the volume of commercial transactions which have the use of goods (rather than their consumption) as their immediate economic end. *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 298 N.Y.S.2d 392 (Civil Court of City of N.Y.), *rev'd on other grounds*, 316 N.Y.S.2d 585 (N.Y.Sup.Ct. 1970).

As one author has stated, "[t]he importance of leasing as a way of financing facilities and equipment needed by commerce and industry can hardly be overstated. In the last ten years it has mushroomed at an accelerating pace." Lefevre, *The Tax Law of Lease Transactions Revisited*, 53 TAXES 764 (1975).

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held in *United States v. Jones*, 450 F.2d 523 (5th Cir. 1971), that an airline ticket was not a security, pointing out that not all instruments having value are securities, and concluding that an instrument in order to be a security must not only have value in itself, but it must also "evidence indebtedness in the usual commercial sense." 420 F.2d 525. Other cases could be cited covering various categories of documents, but it appears that the decision in each case depends upon the particular facts of that case.

It should be noted that under the terms of the equipment leases in this case, the lessee had no option to terminate the lease, and in the event of a default by the lessee, Alphabetland could take possession of the equipment and sell it, retain all prior payments of rent, and hold the lessee for the balance of the unpaid rent. Since the lease specifically provided that the equipment was to be considered personal property, it is difficult to understand defendants' argument that the equipment should be considered fixtures. In view of the nature of the equipment, we believe the equipment leases obviously transferred an "interest in goods, wares and merchandise," and thus could be considered securities within the meaning of § 2311. More important, however, is the fact that the equipment leases have "intrinsic value" and "are recognized and used as such in the regular channels of commerce." *United States v. Canton, supra.* The loan officer at Middle States Leasing testified that the leases could have been sold to any other financial institution, and that the loans would not have been made without the equipment leases as collateral. His testimony further demonstrated that the leases were valuable, in that Alphabetland would receive payments on the equipment it was renting to the franchisees with an interest return. The fact that Alphabetland used the leases as collateral for loans from Middle States Leasing would seem to foreclose defendants from now asserting that the leases were without value.

In short, defendants ask this Court to look to form over substance—to hold that the equipment leases were "true" leases or bailments for hire. The fact is that the leases in this case were not bailments for hire, but were intended to be used as security. As one author has noted, "it is not uncommon to find that what is called an ordinary lease . . . is in substance a lease . . . for security—that is,

to most pre-code and post-code lawyers, 'a conditional sale' . . . " Coogan, *Leases of Equipment and Some Other Unconventional Security Devices: An Analysis of UCC Section 1-201(37) and Article 9* in BENDER'S SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 4A.01 (1977). In our opinion, each equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in § 2311.

Interstate Transportation

The defendants contend that even if this Court determines that an equipment lease is a security within the meaning of § 2311, Count three must be dismissed because the evidence failed to establish that the defendants knowingly transported the forged equipment leases in interstate commerce. As previously pointed out, the loan officer at Middle States Leasing testified that both defendants were present at the loan closings, and that they presented the original supporting documentation at that time. On at least one occasion, the loan closing was attended solely by the defendants and representatives of Middle States Leasing, and the defendants were the only persons present at the closing who had access to or were in a position to produce the original equipment lease. The evidence established that the offices of Alphabetland were in Long Island, that both defendants resided in Long Island, and that the loan closings were held in Passaic, New Jersey. The obvious inference to be drawn from this evidence was that the defendants travelled from Long Island to New Jersey in order to deliver the documents to Middle States Leasing. The evidence was clearly sufficient to present a jury issue, and the jury resolved that

question against the defendants. The testimony of Alphabetland employees, as well as other evidence, established the fact that the defendants knew the lease agreements were forged when they were delivered to Middle States Leasing.

Uncharged Similar Acts

The defendants insist that the District Court erred in allowing evidence concerning forged promissory notes submitted in connection with the London Company Loan. Prior to the swearing of the jury, defendants objected to the government's intention to present evidence concerning the London Company loan on the ground that it would expose before the jury evidence of forged promissory notes given by Alphabetland to the London Company—a crime not charged in the indictment. Counsel for the government replied that this evidence was pertinent to Count four of the indictment, which charged defendants with misrepresenting the financial condition of Alphabetland to Maryland National Bank by failing to disclose the existence of the London Company loan. We believe that the District Court properly admitted the London Company loan evidence as being relevant to the charges contained in Count four of the indictment. As we held in *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260 (1978),

> It is well established that evidence of other crimes, if relevant, is admissible against a defendant except when offered solely to prove criminal character or disposition. (citations omitted) One purpose for which such similar acts may be introduced is to prove knowledge, intent, identity, and plan or design. Fed.

R.Ev. 404(b); *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851, 94 S.Ct. 144, 38 L.Ed.2d 100 (1973). 580 F.2d at 1149.

In addition to the fact that the evidence was properly admitted under the above mentioned theories, it is clear that the evidence in question was admissible as demonstrating a connected or inseparable transaction from the crimes charged in the indictment. *See United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978); *United States v. Calfon*, 607 F.2d 29 (2d Cir. 1979).

Sufficiency of the Fourth Count

Defendants maintain that the fourth count of the indictment should be dismissed because it does not sufficiently state the essential facts constituting the offense charged. This contention was not raised in the District Court and has therefore been waived. Rule 12(b)(2), Fed.R.Crim.P.; *United States v. Rodriguez*, 556 F.2d 638, 641 (2d Cir. 1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1233, 55 L.Ed.2d 762 (1978). Moreover, an examination of the defendants' arguments under this point reveals that they are patently without merit. Count four set forth the date and place of the offense, identified the bank that was misled, listed all of the essential elements of the offense, identified the specific documents used to mislead the bank, and stated the manner in which these documents were misleading.

Sufficiency of the Evidence

Viewing the evidence in a light most favorable to the government, as we must, there is no merit to the defen-

dants' arguments that the evidence at trial was legally insufficient to convict them of either the conspiracy count or the unlawful misrepresentation to a bank count.

Adequacy of Angrist's Representation at Trial

Angrist's claim that he did not receive adequate representation before or during trial is meritless. As we stated in *United States v. Rodriguez*, *supra*,

> In any complicated case every lawyer . . . is likely to make both procedural and substantive errors, often reflecting mistakes of judgment under pressure. He is also apt to make minor errors of omission. But that is no reason to embrace the specious argument that a defendant has been prejudiced if his counsel fails to raise even meritless points in an effort to preclude a just conviction. 556 F.2d at 642.

The Court's Charge

The defendants argue that the Court's failure to charge the jury concerning the means of determining whether an equipment lease was a "security" denied them a fair hearing. In this connection, it is significant that the defendants neither requested such a charge, nor interposed any objection when the Court indicated that in light of the concession made, he would charge the jury as a matter of law that an equipment lease was a security within the meaning of the statue. Regardless, therefore, of whether or not the question might normally be one for the jury, the action of the Court was proper under the circumstances of this case.

Conclusion

Having fully considered all contentions made by the defendants, and finding them wholly without merit, we are of the opinion that the judgments of conviction as to both defendants should be, and the same are hereby,

AFFIRMED.

APPENDIX B

EQUIPMENT LEASE

GOVERNMENT EXHIBIT SIX

ALPHABETLAND PRE-SCHOOL FRANCHISES, INC.
511 Hempstead Avenue
West Hempstead, New York 11552

No. Illegible Schedule_____

ALPHABETLAND PRE-SCHOOL FRANCHISES, INC. hereby leases to the undersigned Lessee, and Lessee hereby leases and rents from Lessor, the equipment described in the schedule listed below and additional lease schedules (hereinafter collectively called "Schedule")subject to the terms and conditions set forth below and continued on the reverse side hereof.

SCHEDULE

1. TERM: 60 Months.
2. RENTAL PAYMENTS: $823.00 per month for the first 60 months.
3. ADVANCE RENTALS: $1,623.00, payable at the time of signing of this schedule, to be applied to the first and last rental payments.
4. RENEWAL OPTION: None.
5. SECURITY DEPOSIT: $3,000.
6. EQUIPMENT LOCATION: 385 Mount Paran Road, Fulton County, Georgia.

SCHEDULE

SCHEDULE

7. LESSEE'S ADDRESS: Same.
8. EQUIPMENT DESCRIPTION: See attached schedule.
9. LIABILITY INSURANCE REQUIRED: 1,000,000 Personal Injury 30,000 Property Damage.

SCHEDULE

1. TERMS AND RENTAL NOTICES: Subject to the conditions herein stated, this lease shall be for a period stated in the Schedule commencing with delivery to Lessee, its agent or a carrier, whichever shall be earlier. Lessee agrees to pay the total rent for the term, which shall be in the total amount of all rental payments stated in the schedule, plus such additional rentals as are provided herein. All payments shall be made on the first of each month in advance at the office of the Lessor specified below or at such other place as Lessor or Lessor's assignee may in writing designate.

2. TITLE: Lessor shall at all times retain title to the equipment. All documents of title and evidence of delivery shall be delivered to the Lessor. Lessor will not change or remove any insignia

or lettering which is on the equipment at the time of delivery or which is thereafter placed thereon indicating Lessor's ownership thereof, and at any time during the lease term, upon request of Lessor, will affix to the equipment, in a prominent place, labels, plates or other markings supplied by Lessor stating that the equipment is owned by Lessor. Lessor may at Lessee's expense cause this lease to be filed, recorded, refiled, rerecorded or financing statements (which may be signed by the Lessor only if permitted by statute) to be filed as permitted or required by law. Lessee at its expense shall protect and defend Lessor's title, at all times keeping the equipment free from any legal process and/or encumbrances whatsoever, including,but not limited to liens, attachments, levies and executions, and shall give Lessor immediate written notice thereof and shall indemnify Lessor for any loss caused by the failure of the Lessee to take action as provided herein.

3. PURCHASE, DELIVERY AND PREPAYMENTS: Lessee requests Lessor to purchase the equipment from a vendor selected by Lessee and arrange for delivery, which shall be deemed complete upon arrival at Lessee's premises or when otherwise received by Lessee's agent. If Lessee requests Lessor to make any payments to vendor or supplier, or if Lessor makes any such payment prior to delivery and acceptance, and if Lessee for any reason does not accept the equipment, Lessee shall, on demand by Lessor, pay Lessor any amounts theretofore paid or owing by Lessor in respect to the purchase of such item of equipment and upon such payment, Lessee shall be subrogated to Lessor's claims, if any, against the manufacturer or other supplier thereof and Lessee shall become entitled to such item, as-is where-is, without warranty, express or implied, by the Lessor with respect to any matter whatsoever, and Lessee shall indemnify and save Lessor harmless from any and all liability to the supplier thereof.

4. CARE AND USE OF EQUIPMENT: Lessee, at its own cost and expense, shall maintain the equipment in good operating condition, repair,and appearance, and protect same from deterioration other than normal wear and tear; shall use the equipment in the regular course if its business only, within its normal capacity, without abuse, and in a manner contemplated by the manufacturer thereof; shall not make modifications, alterations or additions to the equipment (other than normal operating accessories or controls), without the written consent of Lessor, which shall not be unreasonably withheld; shall not so affix the equipment to realty so as to change its nature to real property, and agrees that the equipment shall remain personal property at all times regardless of how attached or installed; shall keep the equipment on the premises where delivered, and shall not remove the equipment without the written consent of Lessor, which shall not be unreasonably withheld. All modifications,

repairs, alterations, additions, replacements, substitutions, operating accessories and controls shall accrue to the equipment and become the property of the Lessor. Lessor shall have the right, during normal hours, to enter upon the premises where the equipment is located in order to inspect, observe or remove same, or otherwise protect Lessor's interest, and Lessee shall cooperate in affording Lessor the opportunity to do same. For the purpose of assuring Lessor that Lessor's equipment will be properly serviced, Lessee agrees to cause the equipment to be maintained pursuant to the manufacturer's standard preventive maintenance contract and/or recommendation.

5. NET LEASE: Lessee intends the rental payments in this lease to be net to the lessor. Lessee shall comply with..* all taxes, including but not limited to sales and use taxes, excise taxes,

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* Illegible on printer's available copy. Certified original on file with court.

personal taxes and assessments, ...* freight and transportation charges and any similiar charges imposed on the ownership, possession, or use of the .....* this lease. Lessee shall pay to Lessor all costs and expenses including attorney's fees as hereinafter defined. .....* session expenses in connection with the enforcement of Lessor's rights under this lease. In case any charges.....* to be paid by the Lessee under this lease shall remain unpaid after the due date thereof, Lessor shall have the right.....* pay the same and to charge such payments with interest at the highest legal rate from the date of said payment .....* with the next rental payment. The rental herein is based on the prime rate as of the date hereof. Lessee agrees.....* prime rate during the term hereof, the rental

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* Illegible on printer's available copy. Certified original on file with court.

shall be increased in accordance therewith, at the option of the .....*.

6. INDEMNITY: Lessee shall and does hereby indemnify and save Lessor harmless from any and all.....* ship, selection, possession, leasing, renting, operation, control, use, maintenance, delivery and/or return of.....* limited to, injuries causing personal injury, property damage and/or death but shall be credited with any.....* respect thereto from liability insurance secured by Lessee. That said indemnification shall include all costs and.....* less incurred by Lessor in connection with any suits or actions resulting from any such liability.

The additional terms and conditions on the reverse side hereof are incorporated in and made a part of this.....*

The undersigned agree to all the terms and conditions set forth above

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* Illegible on printer's available copy. Certified original on file court.

and on the reverse side hereof, and in witness.....* execute this lease. This lease shall be binding upon all parties, their successors, legal representatives and assigns.

ACCEPTED AT WEST HEMPSTEAD, N.Y.
ON January 27, 1975
ALPHABETLAND PRE-SCHOOL FRANCHISES, INC.
BY /s/ Illegible
Authorized Representative
(Please sign all 3 copies)

DATE January 27, 1975
EARLY EDUCATION SYSTEMS INC.
(Lessee)
BY /s/ David L. Kelly
ITS President
(Title)

(IF CORPORATION AFFIX CORPORATE SEAL)

7. INSURANCE: Lessee shall keep equipment insured against all risks of loss or damage from every cause whatsoever for not less than the aggregate amount of unpaid total rent for the balance of the term of this lease, and shall carry public liability insurance, both

personal injury and property damage.. ...*equipment. All said insurance shall be in form and amount and with companies satisfactory to Lessor. All insurance for loss or damage shall provide that Lessor shall be the loss payee and that losses, if any, shall be payable to Lessor, and all such liability insurance shall be in the joint names of Lessor and Lessee. Lessee shall pay the premiums therefor and deliver to Lessor the policies of insurance or duplicates thereof, or other evidence satisfactory to Lessor of such insurance coverage. Each insurer shall agree, by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it will give Lessor 30 days prior written notice of the effective date of any alteration of cancellation of such policy. The proceeds of such insurance, payable as a result of loss or of damage to equipment, shall be applied at the option of Lessor, (a) toward the replacement, restoration or repair of equipment which may be lost, stolen

* Illegible on printer's available copy. Certified original on file with court.

destroyed or damaged or (b) toward payment of the obligations of Lessee hereunder. Lessee hereby irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of and execute and endorse all documents, checks or drafts received in payment for loss or damage under any said insurance policy. In case of the failure of Lessee to procure or maintain said insurance to comply with any other provision of this lease, Lessor shall have the right, but shall not be obligated, to effect such insurance or compliance on behalf of Lessee. In that event, all monies spent by, and expenses of, Lessor in effecting such insurance or compliance shall be deemed to be additional rent, and shall be paid by Lessee with interest at highest legal rate to Lessor with the next monthly payment of rent.

8. DEFAULT: If (a) Lessee shall default in the payment of any rent or in making any other payment hereunder when due, or (b) Lessee shall default in the payment when due of any indebtedness of Lessee to Lessor arising independently of this lease, or (c) Lessee shall

breach any warranty hereunder, or (d) Lessee shall default in the performance of any other covenant herein and such default continues for 5 days after written notice thereof to Lessee by Lessor, or (e) Lessee becomes insolvent or makes an assignment for the benefit of creditors, or (f) Lessee applies for, or consents to, the appointment of a receiver, trustee, conservator or liquidator of Lessee or of all or a substantial part of the assets of Lessee, or if such receiver, trustee, conservator or liquidator is appointed without the application or consent of Lessee, or (g) petition is filed by or against Lessee under the Bankruptcy Act or any amendment thereto (including, without limitation, a petition for reorganization, arrangement or extension), or under any other insolvency law or law providing for the relief of debtors, then, if and to the extent permitted by applicable law, Lessor shall have the right to exercise any one or more of the remedies as provided hereafter.

REMEDIES: In the event of default, Lessor may at its option, (a) declare the entire

amount of the unpaid rental for the full balance of the term of the lease due and payable, without further notice, whereupon the same shall become immediately due and payable, (b) without demand or legal process and without being guilty of trespass or conversion and without thereby rendering the Lessor liable to refund any sums received as a deposit or as prepaid rent and without constituting a termination of the lease or relieving the Lessee of its original obligation, enter into the premises where the equipment may be found and take possession of same and remove same, whereupon all rights of Lessee in such equipment shall terminate absolutely and (c) retain all prior payments of rent and sell the same at public or private sale with or without notice to Lessee, with or without having the equipment at the sale, at which sale Lessor may purchase all or any part of the equipment or relet the equipment for a longer or shorter term than the original lease, the proceeds of such sale or reletting, less the expenses of retaking, storage, repairing, reselling

or reletting and attorney's fees as hereinafter defined, to be applied to the payment of the unpaid total rent for the balance of the term of this lease. Lessee shall remain liable for the balance of the unpaid rent. Lessee shall be liable for all expenses Lessor may incur in connection with the enforcement of any of its remedies herein, including without limitation, attorney's fees equal to 20% of the total unpaid balance or in any action to recover possession of Lessor's property, 20% of the value of said property. All remedies of Lessor hereunder are cumulative and may, to the extent permitted by the law, be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. No failure on the part of the Lessor to exercise, and no delay in exercising any right or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise by Lessor of any right or remedy hereunder preclude any other or further exercise of any other right or remedy. Whenever

any payment is not made when due hereinunder, the Lessee promises to pay to the Lessor or its assigns, not later than one month thereafter, an amount calculated at the rate of 12% per annum for such delayed payment and to make such payments as liquidated damages occasioned by such delay.

9. RISK OF LOSS: Lessee hereby assumes the entire risk of loss, from any and every cause whatsoever. In event of loss, Lessee at its expense and at Lessor's option shall either (a) repair the equipment, returning it to its previous condition, or (b) replace same with like equipment acceptable to Lessor and in good condition and equivalent value, which shall become the property of the Lessor, or (c) pay Lessor all unpaid rents or such unpaid rents as may be allocated to specific items of equipment. Upon replacement or payment, this lease shall terminate with respect to replaced or paid for equipment and Lessee shall take title to same on an as-is where-is basis. In case Lessee shall fail to repair, replace or pay for same, Lessor may repair at

Lessee's expense, to be charged as additional rental.

10. OTHER COVENANTS: Lessee agrees that its obligations under this lease are absolute, and shall continue in force and effect regardless of the disability of the Lessee to use the equipment because of any reason whatsoever, including but not limited to, wear, act of God, government regulations, strike, loss or damage, obsolescence; breach of contract or warranty; failure of, or delay in, delivery, misdelivery and that its obligations shall not abate due to any claim or setoff against Lessor. Lessee acknowledges Lessor is not the manufacturer of the equipment , nor manufacturer's agent. Lessee warrants that the application, statements and financial reports submitted by it to the Lessor are material inducements to the granting of this lease and that any material misrepresentations shall constitute default hereunder. Lessee agrees that Lessor has made no warranties or representations, express or implied, including the warranty of merchantability, with regard to the

equipment and that the equipment has been selected by the Lessee and is of a design, size, fitness and capacity selected by the Lessee and that the Lessee is satisfied that the same is suitable and fit for its purposes. Lessee agrees to procure for Lessor such estoppel certificates, landlord's and/or mortgagee's waivers or any other documents as Lessor or its assigns may reasonably request to effectuate the purposes of this lease. Lessee agrees to furnish its certified annual financial statements or any other information delivered by it to its banks, stockholders or other creditors and such other financial statements as the Lessor may require. Lessee agrees not to sublet or otherwise assign or transfer its rights and obligations hereunder without the written consent of Lessor, which consent shall not be unreasonably withheld, provided however that any consent to such assignment or transfer shall not release the Lessee from any liability hereunder. Lessee warrants that this lease has been

duly authorized, that no provision of this lease is inconsistent with Lessee's charter or by-laws or any loan or credit agreement or any other instrument to which Lessee is a party or which by Lessor or its property may be bound or affected. Lessee agrees that the Lessor may examine Lessee's books and financial records on due notice. Lessee hereby waives a trial by jury and the right to interpose any counterclaim or offset of any nature or description in any litigation between the Lessee and Lessor with respect to this lease, the property covered hereunder and the repossession hereof.

11. ASSIGNMENT: This lease or any equipment or any rents or other sums to become due hereunder may be transferred or assigned by Lessor without notice and in such event, Lessor's transferee or assignee shall have all rights, powers, privileges and remedies of Lessor hereunder and Lessee's obligations hereunder shall not be subject to

any defense, offset or counterclaim available to Lessee against Lessor. This lease is subject and subordinate to any mortgage which now or hereafter may affect the leased equipment, except that so long as the Lessee is not in default hereunder, the Lessee shall be entitled to peacefully and quietly hold, enjoy, possess and use such equipment during the term specified herein.

12. REDELIVERY: At the expiration of this lease, Lessee shall at its expense deliver equipment to the Lessor at an address specified by Lessor within the continental United States and in the same condition as received, less normal depreciation and wear.

13. RETURNABLE DEPOSIT: The Lessor ackowledges receipt of the sum set forth above as a returnable deposit from the Lessee to secure the faithful performance by the Lessee of all obligations of the Lessee under the lease. The parties agree that at any time the Lessee is in default, Lessor may apply all or any part of said deposit to the payment of

rentals due hereunder and should the Lessee fail to return any or all the equipment leased hereunder, the Lessor at its option, may elect to retain said deposit as liquidated damages.

14. ADDITIONAL SCHEDULES;AMENDMENTS: This lease and all additional leases shall be independent contracts, the rights and remedies thereunder arising severally; but any default on one lease shall be a default on all leases between the parties. Except as provided above, this lease contains the entire agreement between the parties, and may not be altered, modified, terminated or discharged except in writing. Where a noun form herein is inappropriate, the singular or plural form, whichever is appropriate, shall be deemed substituted therefor.

15. RENEWAL OPTIONS: Lessee shall have the option if Lessee is not in default hereunder, upon giving written notice to Lessor at least 30 days prior to the termination of the original or any renewal term of

this lease to renew this lease for such term and at such rental as is specified in the schedule, payable in advance at the beginning of each such term.

16. EXECUTION; LAWS GOVERNING; SERVICE: This lease shall only be binding when accepted by the Lessor at its West Hempstead, N.Y. office and shall be deemed to have been made in Nassau County, New York and shall be govened by the laws of the state of New York except for local recording statutes. As part of the consideration for the Lessor's executing this lease, Lessee agrees that all actions or proceedings arising directly or indirectly from this lease shall be litigated only in courts having situs within the State of New York and the Lessee hereby consents to the jurisdiction of any local, state or federal court located within the State of New York and waives personal service of any and all process upon the Lessee herein, and consents that all such service or process shall be made by certified

mail, return receipt requested, directed to the Lessee at the address hereinabove stated; and service so made shall be complete two (2) days after the same shall have been posted as aforesaid.

APPENDIX C

INDICTMENT

CBA:ARL:mlc
F# 783,617

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.
MAY 23, 1979
TIME A.M._____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

-against- :

HAROLD WEXLER and :
ALAN ANGRIST,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - - x

INDICTMENT

Cr. No._____
(T.18, U.S.C., §§371, 2314, 1014 and 2)

79 CR 314

THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times relevant herein, Alphabetland, Inc. (Alphabetland) was a corporation organized and existing under the laws of the State of New York with its main offices at 511 Hempstead Avenue, West Hempstead, New York.

2. At all times relevant herein, Alphabetland was in the business of selling pre-school nursery franchises to individual investors.

3. At all times relevant herein, the defendant ALAN ANGRIST was the president of Alphabetland, and the defendant HAROLD WEXLER was the vice-president of Alphabetland.

COUNT ONE

Commencing in or about March, 1974 and continuing thereafter until or about August, 1975 both dates being approximate and inclusive, within the Eastern District of New York, the defendants ALAN ANGRIST and HAROLD WEXLER did knowingly and wilfully conspire to commit offenses against the United States in violation of Title 18, United States Code, Section 2314 by conspiring to transport, knowingly and with fraudulent intent, in interstate commerce falsely made and forged securities, and in violation of Title 18, United States Code, Section 1014 by conspiring to make false statements and submit false reports for the purpose of influencing the action of a bank insured by the Federal Deposit Insurance Corporation in connection with a loan.

It was a part of said conspiracy that the defendants HAROLD WEXLER and ALAN ANGRIST, would with unlawful and fraudulent intent, transport in interstate commerce falsely made and forged securities namely, promissory notes and equipment leases, knowing the same to be falsely made and forged, and would deliver said notes and leases to Middle States Leasing Corporation (Middle States Leasing), 663 Main Street, Passaic, New Jersey for the purpose of inducing Middle States Leasing to lend and advance monies to Alphabetland.

It was a further part of said conspiracy that the defendants HAROLD WEXLER and ALAN ANGRIST would knowingly and wilfully make false statements and submit false financial reports to Maryland National Bank, Baltimore, Maryland,

the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, for the purpose of inducing Maryland National Bank to lend monies to Alphabetland.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants HAROLD WEXLER and ALAN ANGRIST, within the Eastern District of New York and elsewhere, committed the following:

OVERT ACTS

1. In or about March, 1974, the defendants HAROLD WEXLER and ALAN ANGRIST did deliver to Middle States Leasing a falsely made and forged promissory note of one Grace Rabinowitz.

2. In or about May, 1974, the defendants HAROLD WEXLER and ALAN ANGRIST did deliver to Middle States Leasing a falsely made and forged equipment lease

of one Marc Charbonneau.

3. In or about August, 1974, the defendants HAROLD WEXLER and ALAN ANGRIST did deliver to Middle States Leasing falsely made and forged equipment leases of one Gary Walter and one Nicole Kimmel.

4. In or about February, 1975, the defendants HAROLD WEXLER and ALAN ANGRIST, within the Eastern District of New York, did prepare and gather documents including a falsely made and forged equipment lease of one David Kelly for delivery to Middle States Leasing.

5. In or about and between November, 1974 and August, 1975, within the Eastern District of New York, the defendant ALAN angrist did mail documents to Maryland National Bank in connection with obtaining a loan.

(Title 18, United States Code, Section 371).

COUNT TWO

In or about August, 1974, within the Eastern District of New York, the defendants ALAN ANGRIST and HAROLD WEXLER, with unlawful and fraudulent intent, did transport in interstate commerce from West Hempstead, New York to Passaic, New Jersey falsely made and forged securities, namely, equipment leases bearing the names Nicole Kimmel and Gary Walter, knowing said leases to be falsely made and forged.

(Title 18, United States Code, Sections 2314 and 2).

COUNT THREE

In or about February, 1975, within the Eastern District of New York, the defendants ALAN ANGRIST and HAROLD WEXLER, with unlawful and fraudulent intent, did transport in interstate commerce from West Hempstead, New York to Passaic, New

Jersey a falsely made and forged security, namely, an equipment lease bearing the name David Kelly, knowing said lease to be falsely made and forged.
(Title 18, United States Code, Sections 2314 and 2).

COUNT FOUR

In or about and between November, 1974 and October, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants ALAN ANGRIST and HAROLD WEXLER unlawfully, wilfully and knowingly made a false statement for the purpose of influencing the action of Maryland National Bank, Baltimore, Maryland, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, by submitting to the aforesaid Maryland National Bank: a Notes Receivable list; a Mortgages and Notes Payable

list; Financial Statements dated as of December 31, 1974, June 30, 1975,

September 30, 1975 and December 31, 1975; a list of schools under construction; a list of schools with projected opening dates; and a Term Guaranty Agreement dated as of May 28, 1974, which documents falsely presented the financial condition of Alphabetland.

(Title 18, United States Code, Sections 1014 and 2).

A TRUE BILL

s/ Shilbert Jones
FOREMAN

s/ Edward R. Korman
EDWARD R. KORMAN s/BJR
United States Attorney
Eastern District of New York

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-2013, 79-2017

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALAN ANGRIST, PETITIONER

v.

UNITED STATES OF AMERICA

HAROLD WEXLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2013

ALAN ANGRIST, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-2017

HAROLD WEXLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether an equipment lease is a security as defined in 18 U.S.C. 2311.

2. Whether petitioner Angrist was deprived of the effective assistance of counsel at trial.

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Miscellaneous:

R. Henson, *Handbook on Secured Transactions* (2d ed. 1979) 6

J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* (2d ed. 1980) 6

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18)[1] is reported at 621 F. 2d 1218.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. The petitions for a writ of certiorari were filed on June 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of unlawfully transporting forged securities, in violation of 18 U.S.C. 2314 and 2 (Count III), making false representations to a federally insured bank, in violation of 18 U.S.C. 1014 and 2 (Count IV), and conspiring to commit those offenses, in violation of 18 U.S.C. 371 (Count I).[2] Each petitioner was sentenced to concurrent terms of two years' imprisonment on Counts I and III, to be followed by three years' probation on Count IV. The court of appeals affirmed (Pet. App. A-1 to A-18).

The evidence at trial is set out in detail in the opinion of the court of appeals (Pet. App. A-1 to A-7). Briefly, it showed that in 1970 petitioners formed Alphabetland, Inc., a corporation engaged in the operation of pre-school nurseries and summer day camps. When fund raising failed in 1972, petitioners began offering Alphabetland franchises, in connection with which petitioners would sell

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[1]"Pet. App." refers to the appendix to the petition in No. 79-2013.

[2]Petitioners were acquitted on another count charging unlawful transportation of forged securities (Count II).

an existing school or a new school in return for cash down payments and promissory notes. When a new school was involved, petitioners would offer a nursery school equipment package, which most franchisees financed by entering into an "equipment lease" with Alphabetland. Under the equipment lease, the franchisee made payments over a period of 60 months, during which time Alphabetland retained title to the equipment. Pet. App. A-3. Although each equipment package cost Alphabetland approximately $15,000, the franchisee was charged $30,000 for it, and the total price of the leasing arrangement, including interest for five years, was more than $40,000. Pet. App. A-5 & n.1.

In an effort to alleviate its severe financial difficulties, in 1974 and 1975 Alphabetland entered into several loan agreements, out of which the indictment in this case arose. Middle States Leasing Company (MLS) lent Alphabetland approximately $270,000, the collateral for which included forged promissory notes and five discounted equipment leases, each of which was also forged. An MSL vice-president testified that if the leases had been genuine, they would have had commercial value, in that they represented the right to receive payment for the equipment. He also testified that the leases were marketable, in that they could be discounted to yet another financial institution. Pet. App. A-4 to A-6. Petitioners' transportation of one of the leases from West Hempstead, New York, to MSL's offices in Passaic, New Jersey, gave rise to the charge of interstate transportation of fraudulent securities on which they were convicted.

The London Company made a loan to petitioners of $100,000, which was similarly collateralized by seven forged promissory notes. Pet. App. A-6.[3]

Finally, petitioners sought a loan from the Maryland National Bank (MNB). In support of their loan application, petitioners submitted financial statements, a list of opening dates for recently constructed schools, a list of schools then under construction, a list of notes receivable, a list of mortgages and notes payable and a term guaranty agreement. The lists of schools were fraudulent, in that none of the schools on the two lists was under construction, and the list of notes receivable included several notes that previously had been pledged elsewhere, contrary to petitioners' representations to MNB. In addition, the $100,000 London Company loan was not listed. When MNB discovered that the London Company had filed a lien against all present and future assets of Alphabetland, petitioners misrepresented the reason for that action and submitted a forged London Company document in support of their explanation. Pet. App. A-6 to A-7. Count IV, which alleged the making of false representations to a federally insured bank, arose out of the foregoing events.

Despite these loans, Alphabetland was unable to improve its financial position, and it declared bankruptcy in 1976. Pet. App. A-7.

ARGUMENT

1. Petitioners contend (79-2013 Pet. 24-34; 79-2017 Pet. 11-21) that the forged equipment lease that formed the basis for the charge of interstate transportation of forged

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[3]Petitioners were not charged with unlawful transportation of these documents, but this loan was relevant to Count IV, which alleged the making of false representations to a federally insured bank.

securities is not a security within the statutory definition of that term. Since both petitioners' trial counsel conceded that an equipment lease is a security within the meaning of 18 U.S.C. 2311 and 2314 (Tr. 19, 1234), petitioners are foreclosed from seeking review of this issue. In any event, as the court of appeals held, the equipment leases involved in this case are "securities" as defined in 18 U.S.C. 2311.

That statute provides that

> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing * * *.[4]

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[4]At the outset, we note that the statute's failure specifically to list equipment leases does not indicate that they are excluded from the statute's coverage. "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the

The court of appeals found that the equipment leases in this case came within the foregoing definition because they "obviously transferred an 'interest in goods, wares and merchandise' " (Pet. App. A-13). In so holding, the court relied on the fact that under the terms of the equipment leases, "the lessee had no option to terminate the lease, and in the event of a default by the lessee, Alphabetland could take possession of the equipment and sell it, retain all prior payments of rent, and hold the lessee for the balance of the unpaid rent" (*ibid.*). The court below also found that the equipment leases "have 'intrinsic value' and 'are recognized and used as such in the regular channels of commerce' " (*ibid.*). The court relied on the MSL loan officer's testimony that the leases, if valid, could have been discounted to another financial institution and that MSL would not have made the loans to petitioner without the equipment leases as collateral. Indeed, as the court stated, "[t]he fact that Alphabetland used the leases as collateral for loans from Middle States Leasing would seem to foreclose [petitioners] from now asserting that the leases were without value" (*ibid.*). The court also recognized that the leases were valuable to petitioners because they guaranteed to them payments and interest on the equipment leased (*ibid.*).

The decision of the court of appeals is clearly correct. Merely denominating a transaction a lease does not make it one for legal purposes. Rather, courts will look to the nature of the agreement, and if it bears the substantive characteristics of an installment sales contract, whereby

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general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *American Fed. of Television & Radio Artists* v. *N.L.R.B.*, 462 F. 2d 887, 889-890 (D.C. Cir. 1972) ("the word 'includes' is a term of enlargement, not of limitation, and * * * the reference to certain entities or categories is not intended to exclude all others").

the seller retains title only to secure the obligation of the buyer to pay for the goods, courts will treat it as such. Among other factors, courts will consider whether title will pass to the lessee at the expiration of the lease, with or without the requirement of a payment to exercise an option to buy. If the payment for the option is nominal or if exercise of the option is the only economically sensible course for the lessee to take, courts will regard the transaction as a secured sale. See generally J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 880-883 (2d ed. 1980); R. Henson, *Handbook on Secured Transactions* 44-48 (2d ed. 1979). Other factors are also taken into account, such as (White & Summers, *supra*, at 882-883 (footnotes omitted)):

> whether the lessee is required to insure the goods in favor of the lessor for a value equal to the total rental payments; the risk of loss or damage is on the lessee; the lessee is to pay for taxes, repairs and maintenance; there are default provisions governing acceleration and resale; a substantial, non-refundable deposit is required; the goods are to be selected from a third party by the lessee; the rental payments are equivalent to the cost of goods plus interest; the lessor lacks facilities to store or retake the goods, the lease is to be discounted with a bank; warranties normally found in a lease are excluded; the goods are fixtures impractical to remove. This list is not exhaustive. Nor is any one factor conclusive standing alone.

The lease attached to the petitions in this case contains most of the foregoing indicia of an installment sales contract. The rental and interest payments totaled over $40,000, more than twice the original cost of the equipment to petitioners. Pet. App. A-5 & n.1, A-19. The

lessee was obligated to maintain the equipment (*id.* at A-23 to A-24), to pay the taxes thereon (*id.* at A-24 to A-25), to insure the equipment in favor of the lessor for not less than the total unpaid rent and to maintain insurance against personal injury and property damage (*id.* at A-27 to A-28). The lessee bore the entire risk of loss (*id.* at A-33), and the lease was discounted with a bank. As the court of appeals found (*id.* at A-13), the lessee had no option to terminate the lease, and, in the event of a default by him, the lessor could declare the entire unpaid rental immediately due, take possession of the equipment and sell it, retain all prior payments, and hold the lessee liable for any balance of the unpaid rent. Moreover, upon expiration of the lease, the lessee could retain the goods by forfeiture of his $3,000 "security deposit" (*id.* at A-38).[5]

Under all of these circumstances, it is clear that the equipment lease in this case constituted "evidence of indebtedness" or an "instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise," and that, therefore, the court of appeals was correct in holding (*id.* at A-14) that "each equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in § 2311."

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[5]Petitioners assert (79-2013 Pet. 27; 79-2017 Pet. 18-20) that the lease contained no option to purchase. While the provision for retention of the goods by the lessee upon forfeiture of his deposit is not expressly designated an option to purchase (rather, it states that the lessor may retain the deposit as "liquidated damages"), viewing the substance of the lease over its form, it is clear that upon its expiration ownership of the goods passed to the lessee if he chose to forfeit his security deposit.

Contrary to petitioners' claims (79-2013 Pet. 25-26; 79-2017 Pet. 12-15), this holding does not conflict with any other decision. As petitioners themselves point out (79-2013 Pet. 30-31; 70-2017 Pet. 15), no other decision has dealt with the question of Section 2314's applicability to equipment leases. To be sure, some courts have declined to expand the definition of "security" to include such items as department store scrip (*United States* v. *Dunlap*, 573 F. 2d 1092 (9th Cir. 1978)), motor vehicle registration certificates (*United States* v. *Canton*, 470 F. 2d 861 (2d Cir. 1972)), airline tickets (*United States* v. *Jones*, 450 F. 2d 523 (5th Cir. 1971)), or credit card invoices (*Merrill* v. *United States*, 338 F. 2d 763 (5th Cir. 1964)). Even under the restrictive view of the statute espoused by those cases, however, the equipment lease at issue here would qualify as a security under the statute. This case, therefore, is an inappropriate one for review of the alleged divergence among the circuits.

2. Petitioner Angrist raises (Pet. 3-4, 14-24) several technical, nonprejudicial alleged deficiencies of his trial counsel, arguing that the Court should grant his petition in order to resolve the conflict among the circuits regarding the standard to be employed in finding ineffective assistance of counsel (compare *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1328 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("reasonably competent and effective representation"), with *Indiviglio* v. *United States*, 612 F. 2d 624, 626-627 (2d Cir. 1979), cert. denied, U.S. (1980) ("farce and mockery of justice")). The present case is not an appropriate vehicle for the resolution of that conceded conflict, however, since under either standard the conduct of petitioner's counsel, rendered over the course of a six-day trial that resulted in the jury's acquittal of petitioner on one of the four counts with which he was charged, was within "the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970).

Specifically, petitioner Angrist asserts that he was denied effective assistance of counsel by his trial attorney's (1) concession that an equipment lease is a security within the meaning of 18 U.S.C. 2311; (2) failure to move to dismiss the count of the indictment alleging interstate transportation of forged securities on the ground that it did not charge any facts that would show that an equipment lease is a security; (3) failure to move to dismiss the count of the indictment alleging the making of false representations on the ground that it did not specify exactly what entires among the 32 pages that petitioners allegedly submitted to the bank were alleged to be false or "the manner in which the 32 pages of documents alleged to be misleading were, in fact, misleading" (79-2013 Pet. 3); (4) failure to seek a bill of particulars to ascertain what entries in the 32 pages were claimed to be false; (5) failure to submit meaningful requests to charge the jury; and (6) admission on the record that he had never participated in a case involving expert witnesses.[6]

Since, as discussed above and as found by the court of appeals, the equipment lease in this case clearly constituted a security within the meaning of 18 U.S.C. 2311, petitioner Angrist could not have been prejudiced by his counsel's concession of that point or by his related failures to move to dismiss the indictment or request jury instructions on that ground. With respect to points (2)

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[6]Petitioner Angrist also asserts that his trial attorney should have subpoenaed the books and records of Alphabetland or offered expert testimony to establish that the representations charged in Count IV were not fraudulent. Since this claim was not raised in the court of appeals, however, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

and (3), it is well established that an indictment will not be dismissed for insufficiency so long as it affords the defendant notice of the charge he must be prepared to meet at trial and provides an adequate record to prevent his being placed in jeopardy a second time for the same offense. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *United States* v. *Pandilidis*, 524 F. 2d 644, 648 (6th Cir. 1975), cert. denied, 424 U.S. 933 (1976). Since the counts charging interstate transportation of fraudulent securities and making false representations to a federally insured bank satisfied those requirements, petitioners were not entitled to dismissal of the indictment, and petitioner Angrist's counsel cannot be faulted for not requesting that relief. Nor can petitioner Angrist complain of his trial counsel's failure to seek a bill of particulars since, prior to trial, the government made an extensive voluntary disclosure of its case, and petitioner has not pointed to any instance of surprise at trial. The decision not to request that the jury be cautioned not to consider evidence of other uncharged forgeries as proof of Angrist's character would appear to be a matter of trial strategy. In any event, individual jury instructions that petitioner, with the benefit of hindsight, now theorizes could have been submitted, do not establish ineffective assistance of counsel. Finally, petitioner Angrist has not suggested how his trial counsel's statement that he had never participated in a case involving expert witnesses

rendered his assistance ineffective. Indeed, petitioner's counsel called as a witness his own handwriting expert, whose testimony appears to have been instrumental in securing petitioner Angrist's acquittal on the second interstate transportation of fraudulent securities count.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Count II charged petitioners with the interstate transportation of forged equipment leases bearing the names of Nicole Kimmel and Gary Walter. Count III charged petitioners with the interstate transportation of a forged equipment lease bearing the name of David Kelly. Petitioner Angrist's handwriting expert testified unequivocally that the "signature" of Gary Walter was not written by petitioner Angrist (Tr. 1188). The expert's opinion that petitioner Angrist had not signed David Kelly's name was "not as strong" (Tr. 1189). As stated above, petitioners were convicted on Count III (Kelly lease) and acquitted on Count II (Kimmel and Walter leases).

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